No. 98-274

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1997

DON R. TYLER,

Petitioner,

vs.

STATE OF FLORIDA-GOVERNOR LAWTON CHILES, and FLORIDA DEPARTMENT OF INSURANCE-COMMISSIONER OF INSURANCE TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT-DIRECTOR R.J. CASTELLANOS, and FLORIDA DIVISION OF FRAUD-DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES-COMMISSIONER BOB CRAWFORD, and FLORIDA DIVISION OF FORESTRY-DIRECTOR L. EARL PETERSON, and CRAWFORD AND COMPANY-CEO FORREST MINIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M.D., and J. MASON WINES, Attorney at Law,

Respondents.

On Petition For Writ Of Certiorari To The Circuit Court, Tenth Judicial Circuit, Polk County, Florida

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

THE PROCEEDINGS BELOW 1

REASONS FOR DENYING THE WRIT 2

I. The Federal Claims for Which Petitioner Seeks Certiorari Were Never Addressed or Properly Presented to the State District Court of Appeal or the State Supreme Court 2

II. The State District Court of Appeal Dismissed Petitioner's Appeal Pursuant to a Well Established State Rule of Procedure that Serves a Valid State Interest 3

INDEX TO APPENDIX

June 2, 1994 Order Granting Motion to Dismiss A-1

October 7, 1994 Order Granting Motion to Dismiss ... A-3

February 14, 1996 Order Granting Motion to Dismiss A-7

November 19, 1997 Order Dismissing Appeal A-9

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 117 S.Ct. 1028 (1997) 2, 3, 5

Franchi v. Florida Dept. of Commerce, Etc., 375 So. 2d 1154 (Fla. 4th DCA 1979) 4

Hammerstien v. Superior Court of California, et al., 341 U.S. 491 (1951) 3

Henry v. Mississippi, 379 U.S. 443 (1964) 4

Louisville & Nashville R.R. v. Woodford, 234 U.S. 46 (1914) 4, 5

Schwertfeger v. Constant, 109 So. 2d 173 (Fla. 2d DCA 1959) 4

Williams v. State, 324 So. 2d 74 (Fla. 1975) 4

CONSTITUTIONAL PROVISIONS

Fla. Const. Article V, section (3)(b)(3) 1, 3

STATUTES AND COURT RULES

28 U.S.C. § 1257 (1998) 2

Fla. R. App. P. 9.110(b) 1, 2, 3, 4, 5

STATEMENT OF THE CASE

The Proceedings Below

At the trial court level, petitioner Tyler filed a cryptic original complaint and two amended complaints which attempted to assert causes of action titled as fraud, gross and malicious negligence as a result of fraud, denial of due process of law, and fraudulently denied overtime. (Petitioner's Brief at 14). All three versions of the petitioner's complaints were dismissed by the trial court on motions from the respective defendants, the final dismissal being with prejudice. (Appendix A-C).

Petitioner filed an appeal of the trial court's final order dismissing his second amended complaint in the Second District Court of Appeal for the State of Florida on September 30, 1996 (Petitioner's Brief at 14). Petitioner's appeal to the Second District was dismissed as untimely, pursuant to Florida Rule of Appellate Procedure 9.110(b), on November 19, 1997. (Appendix D).

On February 18, 1998, the petitioner applied to the Supreme Court of Florida for discretionary review of the District Court of Appeal's order of dismissal. Petitioner Tyler asked the Florida Supreme Court to accept jurisdiction based on Article V, section (3)(b)(3) of the Florida Constitution, which provides that the Florida Supreme Court shall have jurisdiction to review opinions of the district courts of appeal which expressly and directly conflict with opinions from the state supreme court or other district courts of appeal. On May 27, 1998, the Supreme Court of Florida declined to accept jurisdiction and denied review. (Petitioner's Brief at 14).

REASONS FOR DENYING THE WRIT

I. The Federal Claims for Which Petitioner Seeks Certiorari Were Never Addressed or Properly Presented to the State District Court of Appeal or the State Supreme Court.

Petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1257 (1998). (Petitioner's Brief at 2). 28 U.S.C. § 1257(a) states in pertinent part that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari. . . . " With "very rare exceptions," the United States Supreme Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [the Court] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Court has] been asked to review." *Adams v. Robertson*, 117 S.Ct. 1028, 1029 (1997). "When the highest state court is silent on a federal question before [the Court], [the Court] assume[s] that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption." *Id.* Part of the petitioner's burden is to persuade the court "that the state procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment." *Id.*

In the instant case, petitioner Tyler failed to appeal the dismissal of his second amended complaint to the state district court of appeal in a timely manner pursuant to Florida Rule of Appellate Procedure 9.110(b). Because of petitioner's failure to comply with state rules of procedure, the federal issues that petitioner would have this

Court review were never "addressed by, or properly presented to" the state district court. *Adams*, 117 S.Ct. at 1029. Furthermore, the Florida Supreme Court lacked jurisdiction to review the district court's order of dismissal pursuant to Article V, section (3)(b)(3) of the Florida Constitution. Thus, petitioner's failure to comply with state procedural rules is an adequate and independent ground for the state courts to disregard his claim and for this Court to deny certiorari. *See, e.g., Adams*, 117 S.Ct. at 1030 (stating that petitioners had done nothing to demonstrate that they had complied with applicable state rules or to explain why failure to comply with those rules would not be an adequate and independent ground for the state court to disregard the claim); *Hammerstien v. Superior Court of California, et al.*, 341 U.S. 491, 492 (1951) (holding that where the state supreme court had refused to grant jurisdiction because petitioner failed to utilize proper channel of review, United States Supreme Court had no jurisdiction to review the proceedings).

II. The State District Court of Appeal Dismissed Petitioner's Appeal Pursuant to a Well Established State Rule of Procedure that Serves a Valid State Interest.

The Second District Court of Appeal for the State of Florida dismissed petitioner's appeal due to the fact that petitioner failed to comply with Florida Rule of Appellate Procedure 9.110(b). (Appendix D). Rule 9.110(b) states that jurisdiction of the court is invoked by filing an appeal within thirty (30) days of the order to be reviewed. The order of dismissal that petitioner wished the district court to review was filed on February 23, 1996. (Appendix D). Following a motion for reconsideration, an order

was entered on July 22, 1996 confirming the February 23, 1996, order. (Appendix D). Pursuant to Rule 9.110(b), petitioner had thirty days from July 22, 1996, to lodge his appeal with the state district court. *See also, Schwertfeger v. Constant*, 109 So. 2d 173, 176 (Fla. 2d DCA 1959) (holding that an order dismissing a complaint "with prejudice" was a final judgment for appeal purposes). Petitioner did not file an appeal with the district court until September 30, 1996, well in excess of the thirty day requirement of Rule 9.110(b). (Petitioner's Brief at 14). Therefore, petitioner's appeal was dismissed.

Where a state rule of procedure is reasonable and is clearly announced, failure to comply with that rule will serve as an adequate and independent ground for a state court to disregard a petitioner's claim in most cases. *See Henry v. Mississippi*, 379 U.S. 443, 448 n.3 (1964). Florida Rule of Appellate Procedure 9.110(b) is a reasonable and clearly announced rule. The thirty day filing requirement of Rule 9.110(b) is jurisdictional and is not subject to discretion or arbitrary application. *See Williams v. State*, 324 So. 2d 74, 77 (Fla. 1975). Thus, failure to comply with Rule 9.110(b) is an "irremedial jurisdictional defect" for *any* appeal filed by *any* appellant in the State of Florida. *Franchi v. Florida Dept. of Commerce, Etc.*, 375 So. 2d 1154, 1155 (Fla. 4th DCA 1979).

Given the jurisdictional nature of Rule 9.110(b), there is no reason to believe that there was "an attempt on the part of the state court to evade the decisions of Federal questions . . . by unwarranted resort to alleged rules under local practice." *Louisville & Nashville R.R. v. Woodford*, 234 U.S. 46, 51 (1914). "Unless there is an unwarranted resort to rules of practice by the state court to

evade the decision of a Federal question, [the Court] will not review the [state court's] judgment." *See Woodford*, 234 U.S. at 46.

Petitioner Tyler chose not to comply with the Florida Rules of Appellate Procedure, and as a result, his appeal was denied. In essence, petitioner asks this Court to bypass the Florida state court system and to review a decision that was never afforded review by the state district court of appeal due to petitioner's own non-compliance with state procedural rules. As this Court has explained before, "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 117 S.Ct. at 1031 (internal quotations omitted). Rule 9.110(b), Florida Rules of Appellate Procedure, is valid, reasonable, and well announced, and petitioner's failure to comply with it does not vest the Court with jurisdiction for certiorari.

Respectfully submitted,

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APPENDIX A

IN THE CIRCUIT COURT IN AND
FOR POLK COUNTY, FLORIDA

DON R. TYLER,

Plaintiff,

vs.

CASE NO.
GC-G-94-541

STATE OF FLORIDA:
(including, but not limited
to) DEPARTMENT OF
INSURANCE / DIVISION
OF RISK MANAGEMENT
/ DIVISION OF
INSURANCE FRAUD /
DEPARTMENT OF
AGRICULTURE AND
CONSUMER SERVICES /
DIVISION OF FORESTRY,

Defendants.

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS

THIS CAUSE came before the Court on May 23, 1994 upon Defendants' Request for Extension of Time, Plaintiff's Request for Denial of Extension of Time, Plaintiff's Motion for Default by the Court and Defendants' Motion to Dismiss. Present were the Plaintiff, DON R. TYLER, appearing pro se, and Edwin A. Scales, III, counsel for the Defendants.

The Court ruled on Defendants' Motion to Dismiss, therefore, making the other motions moot. The Court, after hearing argument, reviewing the pleadings and being otherwise more fully advised, hereby

ORDERS AND ADJUDGES that Defendants' Motion to Dismiss is granted without prejudice. Plaintiff has twenty (20) days from the date of this Order to file an Amended Complaint. If Plaintiff does not file an Amended Complaint within twenty (20) days, then this Order shall act as a dismissal with prejudice.

DONE in Chambers at Bartow, Polk County, Florida this 2 day of June 1994.

/s/ Oliver L. Green, Jr.
OLIVER L. GREEN, JR.,
CIRCUIT JUDGE

Copies to:

Don R. Tyler

Edwin A. Scales, III, Esquire

APPENDIX B

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

DON R. TYLER,

Plaintiff,

vs.

Case No. GC-G-94-541

STATE OF FLORIDA – GOVERNOR LAWTON CHILES and FLORIDA DEPARTMENT OF INSURANCE – TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT – DIRECTOR R.J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD – DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES – COMMISSIONER BOB CRAWFORD and FLORIDA DIVISION OF FORESTY – DIRECTOR L. EARL PETERSON and CRAWFORD AND COMPANY – CEO FORREST MINNIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M.D., and J. MASON WINES, attorney-at-law,

Defendants.

ORDER

This matter came before the Court on motions to dismiss Plaintiff's Amended Complaint filed by Defendants State Of Florida – Governor Lawton Chiles, Florida Department Of Insurance – Tom Gallagher, Florida Division of Risk Management – Director R.J. Castellanos, Florida Division Of Insurance Fraud – Director Frank Doolittle, Florida Department Of Agriculture Consumer Services – Commissioner Bob Crawford, Florida Division Of Forestry – Director L. Earl Peterson, Crawford and Company – CEO Forrest Minnix, William L. Earp, M.D., and J. Mason Wines. The Court also heard a Motion to Quash filed by Forrest Minnix, the CEO of Crawford & Company and Plaintiff's Motions for Default against the State Defendants.

A hearing was held on September 21, 1994 during which the Court heard argument from all of the above-named parties. After hearing argument from the parties, reviewing the pleadings and otherwise being fully informed in the matter, it is

ORDERED AND ADJUDGED that the Motion to Dismiss filed by Defendants State Of Florida – Governor Lawton Chiles, Florida Department Of Insurance Tom Gallagher, Florida Division of Risk Management – Director R.J. Castellanos, Florida Division of Insurance Fraud – Director Frank Doolittle, Florida Department Of Agriculture Consumer Services – Commissioner Bob Crawford, and Florida Division Of Forestry – Director L. Earl Peterson is **GRANTED**. It is further

ORDERED AND ADJUDGED that the Motion to Dismiss filed by Defendant Crawford & Company is **GRANTED.** It is further

ORDERED AND ADJUDGED that the Motion to Dismiss filed by Defendant William L. Earp, M.D. is **GRANTED.** It is further

ORDERD AND ADJUDGED that the Motion to Dismiss filed by Defendant J. Mason Wines is **GRANTED.** It is further

ORDERED AND ADJUDGED that the Motion to Quash filed by Forrest Minnix is **GRANTED.** It is further

ORDERED AND ADJUDGED that the Motions for Default filed by Plaintiff is **DENIED.**

DONE AND ORDERD this 7 day of October, 1994 at Bartow, Polk County, Florida.

/s/ Oliver L. Green, Jr.
Oliver L. Green, Jr.
Circuit Judge

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APPENDIX C

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

DON R. TYLER,

Plaintiff,

vs.

Case No. GC-G-94-541

STATE OF FLORIDA – GOVERNOR LAWTON CHILES and FLORIDA DEPARTMENT OF INSURANCE TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT – DIRECTOR R.J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD – DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES – COMMISSIONER BOB CRAWFORD and FLORIDA DEPARTMENT OF FORESTRY – DIRECTOR L. EARL PETERSON and CRAWFORD AND COMPANY – CEO FORREST MINNIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M.D., and J. MASON WINES, attorney-at-law,

Defendants.

_____/

ORDER DISMISSING SECOND AMENDED COMPLAINT WITH PREJUDICE

In accordance with this Court's January 11, 1996, "Order Granting Defendants' Motions to Dismiss or

Quash the Second Amended Complaint," the Court orders that Plaintiff's Second Amended Complaint be, and that the same is hereby, dismissed with prejudice.

The Court reserves jurisdiction to determine motions for attorneys' fees and costs filed within 45 days of the date of this order.

DONE AND ORDERED in Chambers in Bartow, Polk County, Florida, on Febr. 14, 1996.

/s/ J. DALE DURRANCE
HONORABLE J.
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APPENDIX D

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

DON R. TYLER, Appellant, v. STATE OF FLORIDA – GOVERNOR LAWTON CHILES and DEPARTMENT OF INSURANCE TOM GALLAGHER, and FLORIDA DIVISION OF RISK MANAGEMENT – DIRECTOR R.J. CASTELLANOS, and FLORIDA DIVISION OF INSURANCE FRAUD – DIRECTOR FRANK DOOLITTLE, and FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES – COMMISSIONER BOB CRAWFORD and FLORIDA DEPARTMENT OF FORESTRY – DIRECTOR L. EARL PETERSON and CRAWFORD AND COMPANY – CEO FORREST MINNIX, and WILLIAM L. EARP, M.D., and WILLIAM A. FRIEDMAN, M.D., and J. MASON WINES, attorney-at-law, Appellees.	)	Case No. 96-04302

BY ORDER OF THE COURT:

ORDER DISMISSING APPEAL

Don Tyler appeals a final order dismissing his second amended complaint with prejudice, which was filed on

February 23, 1996. Tyler filed his notice of appeal on September 30, 1996. Because the notice was untimely, we dismiss the appeal for lack of jurisdiction.

The time for taking an appeal is a jurisdictional requirement established by Florida Rule of Appellate Procedure 9.110(b). Where the notice of appeal is not filed within thirty days of rendition, the appellate court is precluded from exercising jurisdiction over the appeal. *See Peltz v. District Court of Appeal, Third Dist.*, 605 So. 2d 865, 866 (Fla. 1992); *Apone v. Green*, 249 So. 2d 488, 488 (Fla. 2d DCA 1971).

The determinative issue in this case centers on the rendition date of the February 23, 1996, order. Tyler argues that his motion for clarification filed February 28, 1996, delayed rendition of the order. However, Tyler's motion for clarification was not an "authorized" motion that would delay rendition of the final order. *See* Fla. R. App. P. 9.020(h); *see also Wagner v. Bieley, Wagner & Assoc. Inc.*, 263 So. 2d 1, 3 (Fla. 1972) (holding that an unauthorized motion not permitted under the rules has no effect on rendition); *Adventist Health System/Sunbelt Inc. v. Kiss*, 510 So. 2d 971, 971 (Fla. 5th DCA 1987).

While Florida Rule of Appellate Procedure 9.020(h) was amended in 1992 to ensure that motions for clarification were included in those types of motions that delay rendition, the motion for clarification referred to in the rule is the appellate motion for clarification under Florida Rule of Appellate Procedure 9.330. *See* Committee Notes to Rule 9.020, subdivision (g), (1995). The Florida Rules of Civil Procedure do not authorize the filing of a motion for clarification.

Thus, the only way that Tyler's motion for clarification would be an "authorized" motion that would delay rendition would be if it were deemed to be a motion for rehearing. *See* Fla. R. Civ. P. 1.530 (1996). However, Tyler's motion for clarification cannot be considered a motion for rehearing because he failed to raise any matters that were not previously considered. *See Diamond Cab Co. of Miami v. King*, 146 So. 2d 889, 891 (Fla. 1962).

Nevertheless, this court recognizes that rendition of the February 23, 1996, final order was delayed through a different method. Judge J. Dale Durrance, who entered the February 23, 1996, final order, subsequently was disqualified.

On June 14, 1996, Tyler filed a timely motion for reconsideration. This motion effectively revived the trial court's jurisdiction over the case for the limited purpose of reconsidering previous judicial orders entered by Judge Durrance. *See* § 38.07, Fla. Stat. (1995); Fla. R. Jud. Admin. 2.160(h).

The case was reassigned to Judge Robert A. Young. Judge Young granted Tyler's motion for reconsideration, and on July 22, 1996, entered an order which essentially affirmed Judge Durrance's previous final order. Once Judge Young's order dated July 22, 1996, was filed, the trial court's substantive jurisdiction evaporated and the February 23, 1996, order was rendered. *See Cantera v. District Court of Appeal*, 555 So. 2d 360 (Fla. 1990).

Tyler was required to file his notice of appeal within thirty days of Judge Young's order dated July 22, 1996. Because Tyler did not file his notice of appeal until September 30, 1996 this court is without jurisdiction. *See*

Janelli v. Pagano, 492 So. 2d 796 (Fla. 2d DCA 1986). Accordingly, this appeal is hereby dismissed.

PARKER, C.J., and PATTERSON and NORTHCUTT, JJ., Concur.

I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

/s/ Wm. A. Haddad
WILLIAM A. HADDAD, CLERK

cc: Don R. Tyler
Edwin A. Scales, Esquire
Brian S. Duffy, Esquire
Mary L. Wakeman, Esquire
Laurie T. Dodson, Esquire
Marlene S. Reiss, Esquire
Joseph H. Varner, Esquire [SEAL]

STATE OF FLORIDA
COUNTY OF POLK

THIS COPY IS A TRUE COPY OF ORIGINAL ORDER DISMISSING APPEAL DATED 11-19-97 ON FILE IN THIS OFFICE.
WITNESS, MY HAND AND OFFICIAL SEAL THIS 5TH DAY OF MARCH, 1998 [SEAL]

/s/ William A. Haddad
WILLIAM A. HADDAD, CLERK
SECOND DISTRICT
COURT OF APPEAL